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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROGER DALE THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

Roger Dale Thompson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered June 19, 1979, in a proceeding entitled United States of America, Plaintiff Appellee v. Roger Dale Thompson, Defendant Appellant, appeal from the District Court of the United States for the Eastern District of Kentucky.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is included in its Order printed herein in the Appendix. It confirms the judgment of the District Court, stating:

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JURISDICTION

The judgment of the United States Court of Appeals was entered June 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. Supreme Court of the United States Revised Rules, Rules 21, 22 and 23.

QUESTIONS PRESENTED

1. Whether the theory of constructive possession of a firearm can be extended without limits as to time of discovery or connection with the person involved, especially under the particular facts in this case.

2. Whether double prosecution in a federal court may repeat trial in a state court without approval of the Attorney General under the "Petite Policy", especially under the particular facts in this case.

Said questions involve violations of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT

This Petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court for the Eastern District of Kentucky made on two of the several findings, namely, (1) the verdict was contrary to the evidence; and (2) the requirements of the "Petite Policy" were ignored.

Petitioner was indicted on the 20th of April, 1978, and charged with "receiving and possessing firearms in commerce and affecting commerce having been convicted of a felony in violation of Title 18 App. §1202(a)(1), U.S.C. 2241 and Title 28 U.S.C. 2254".

Petitioner had been previously indicted in the Bath County Court October 24, 1977, for Armed Burglary but had been convicted and sentenced for Burglary only, the Armed Burglary charge having been ignored by the jury.

Petitioner was, however, convicted in the District Court for possession of firearms in the burglary and was sentenced by the District Court to serve two years consecutive to the sentence received in the state court.

Two points in this statement are emphasized in this presentation to this Court.

Point One: The Petitioner was not found alone in the premises of a drug store at 2 A.M., August 3, 1977. His brother, McClellan Thompson, was found there too and was found first.

McClellan Thompson, later convicted of both the burglary charge which included the gun charge, was taken by the arresting officer from the store to the police station when he was examined, booked and incarcerated. Only then, possibly half an hour later, did the officer go back to the store and there discovered the Petitioner still sitting on a chair facing a corner. He was arrested but no gun had yet been found. Again the arresting officer took his quarry to the police station for routine procedures.

Then, for the third time, the officer went back into the store--possibly another half hour later--and then discovered the gun. It was, in the officer's own words, "Sittin in behind some shelves and I re'ched it up in the towel".

The officer further admitted that it might have been an hour or forty-five minutes between the arrest of the first brother and the finding of the gun. The officer further admitted that he did not know whether the Petitioner ever had actual possession of the gun, nor who was the owner, nor who intended to exercise dominion over it. Another officer admitted no tests were run on the gun and no fingerprints were taken. On this evidence came a verdict of Firearms Possession.

Point Two: Before this case was brought in the United States District Court the Petitioner had already been indicted and tried on a state charge of Armed Burglary but convicted only on a charge of Unarmed Burglary. On this record the United States proceeded to bring federal charges on the same incidents and the

same gun without first seeking authority for double prosecution from the Attorney General as is general practice in "Petite Policy" cases.

DECISION OF THE COURT OF APPEALS

The Court of Appeals in its Order confirming the judgment of the District Court found that all objections raised in argument before that Court were without merit. The two findings to which this Petition now addresses itself as raising constitutional issues are (1) "the evidence was sufficient to support jury's verdict" and (2) "that the "Petite Policy" did not bar this prosecution".

REASONS FOR GRANTING THE WRIT

I

A constitutional right to a fair trial has been violated when a verdict is unsupported by the facts required in the particular statute under which the action is brought. This being a firearms case, possession is of the essence, either actual or constructive. There was no evidence of actually finding the gun on the person or near the person when he was arrested. Sometime later, after the person of the Petitioner had been removed from the premises, the gun was found, "sittin in behind some shelves". The jury was shown pictures of someone else sitting in the same chair where it was alleged the Petitioner had been sitting when arrested and argument was made as to the proximity of the location of the gun. But all this was staged after the Petitioner had been taken from the premises. Moreover, the arresting officer himself

negated the accessibility factor by testifying that the gun was found behind some shelves--and that there was no actual possession at any time, no ownership, dominion, or control shown, and that no tests were made to establish any connection with the Petitioner. This case raises the question as to whether such insufficient evidence,and the verdict it produced, violated this Petitioner's right to a fair trial, since the statute in question requires proof of "receiving and possessing firearms in commerce and affecting commerce, having been convicted as a felon".

II

A constitutional right has been violated when an exception is made in a particular case to a rule requiring a United States Attorney to secure permission from the Attorney General to bring a duplicate case in the federal courts after a determination had been made in a state court. Here, the Petitioner had been charged and tried in the state court with Armed Burglary but had been convicted of Unarmed Burglary.

Renaldi v. United States, 434 U.S. 22, 29, 98 S.Ct. 81, stated that the "Petite Policy" is to protect the individual from any unfairness associated with multiple needless prosecutions even though it goes on to say that this benefit should be received only when its application is urged by the government. Here the government did not receive official sanction to proceed in retrying the same burglary case involving the same gun. It did not even attempt to receive such sanction or have a determination made as to whether

or not it should urge the application of the "Petite Policy"

It is not contested that Abbate v. United States, 359 U.S. 187 (1959), does state that state prosecution does not bar a successive federal prosecution but that is not an umbrella authority to drag a repeated case through the federal courts in a re-run of the same event with the same evidence.

It is precisely that point to which the Petitioner draws this Court's attention. Under all the circumstances disclosed herein it is suggested that the government should have urged the application of the "Petite Policy" herein. In these days of clogged dockets and duplication of effort, perhaps the Abbate case is not above re-interpretation. Even the majority opinion in the Abbate case admitted "We do not write on a clean slate in deciding this question", and the impressive dissent consisted of Mr. Justice Black, the Chief Justice and Mr. Justice Douglas. Perhaps it is time to relieve the federal courts of re-trying state cases foisted upon federal dockets because a state jury brought in a lesser verdict than the state prosecutor wanted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. DAMMARELL
1300 Tri-State Building
Cincinnati, Ohio 45202

Attorney for Petitioner

APPENDIX

I. Transcript of Testimony of Government Witnesses

II. Order of Sixth Circuit Court of Appeals

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

ROGER DALE THOMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX I

TRANSCRIPT OF TESTIMONY OF GOVERNMENT WITNESSES

Government Witness: Clark Dale Sparks, Police Officer, Owingsville Police Department, on Cross-Examination:

Q. Is that the same weapon or a different weapon from that you found in the Rexall Drugstore on August 3, 1977?

A. This is the same weapon. (App.Trans. 197)

* * * * * * * * * * *

Q. You just grabbed?

A. No sir, I took it,and it was sittin' in behind some shelves, and I re'ched it up in the towel. (App.Trans. 232)

* * * * * * * * * * *

Q. And you found no gun in Roger's possession at the time he was arrested? Is that right?

A. No sir, I didn't. (App.Trans. 227)

* * * * * * * * * * *

Q. So it was an hour or forty-five minutes between the time of the arrest of Roger before you found any weapon at all, is that right?

A. It might have been that long since I arrested Clell (N.B. brother and co-defendant of Defendant Appellant who pleaded guilty to,and was sentenced for, Second Degree Burglary, which included gun possession) but it wouldn't have been more than fifteen or twenty minutes from the time I arrested Roger.

Q. Well, when you arrested Roger, you took him down to the Sheriff's station, to Sheriff's office?

A. Yes. (App.Trans. 227)

Q. And then you and Mr. Bohn went back to the drugstore and made a search and it was at this time that you found the weapon?

A. Yes.

Q. You never saw Roger Dale Thompson in actual possession of a weapon on the morning of August 34d, 1978?

A. No sir.

Q. And you don't know whether, and you can't say whether, he ever had actual possession of the weapon you found in the drugstore, is that correct?

A. Yes sir.

Q. And you don't know who was the owner of the gun that you found in the drugstore? (App.Trans. 228)

A. No sir, I don't.

Q. And you don't know whether, and you can't say whether, he ever had actual possession of the weapon you found in the drugstore (App.Trans. 228)

A. No sir, I don't.

Q. And you don't know who intended to exercise dominion or control over that gun, do you?

A. No sir.

Q. And if you were to make a statement as to who intended to exercise dominion and control over that gun, it would be pure speculation, would it not?

A. Yes, sir. (App.Trans. 229)

Government Witness: Detective Harmon,Bureau of Alcohol, Tobacco and Firearms on Cross-Examination

Q. Do you know whether any scientific tests were run on the pistol you testified in regard to?

A. No.

Q. Were there any fingerprint tests made on the weapon?

A. No.

Q. Are you aware of whether any fingerprints were made while it was in the possession of other officers of the Bureau of Alcohol, Tobacco and Firearms?

A. None, to my knowledge. (App.Trans. 179)

APPENDIX II

FILED

JUN 19 1979

JOHN P. HEHMAN, Clerk

No. 78-5401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.) ORDER
ROGER DALE THOMPSON,)
Defendant-Appellant.)

Decided and Filed_____

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

Defendant-appellant, Roger Dale Thompson, was convicted of being a felon in possession of a firearm. 18 U.S.C. § 1202(a)(1). Appellant was apprehended inside a drug store after apparently breaking into it after store hours. After appellant was removed from the store, the firearm in question was found in the alcove in which appellant had been hiding when caught. The store owner testified that the firearm had not been there previously. Appellant has raised six issues on appeal.

The court has considered the briefs and oral arguments of counsel and has studied the record and is fully advised in the premises. The court is of the opinion that none of the issues raised on appeal have merit. The indictment should not have been dismissed on double jeopardy grounds; the district court

properly excluded references to appellant's state court trial; the district court did not abuse its discretion in admitting certain photos; the evidence was sufficient to support the jury's verdict; undue emphasis was not placed upon appellant's prior felony conviction; and the "Petite Policy" did not bar this prosecution.

Therefore, it is hereby ordered that the judgment of the district court be, and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Cert

No. 79-5180

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5180

ROGER DALE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After reviewing this case in light of the Department of Justice "Petite" policy against dual state and federal prosecutions for substantially the same conduct, we are requesting that the Court vacate petitioner's conviction for violating the federal gun laws.

1. Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to two years' imprisonment, to be served consecutively to a previously imposed state sentence based on the same incident that gave rise to this prosecution. The court of appeals summarily affirmed (Pet. App. 11-12).

In the early morning hours of August 3, 1977, police officers in Owingsville, Kentucky apprehended petitioner and his brother in the back rooms of a pharmacy into which they had unlawfully entered. The policemen took petitioner and his brother to the police station and charged them with burglary. Approximately 20 minutes later, the officers, now accompanied by the pharmacy owner, returned to the pharmacy where they found a semi-automatic pistol on the shelf next to the spot where petitioner had been arrested. The gun did not belong to the owner and had not been on the shelves at the close of business on August 2, 1977. When the police and the owner returned to the station with the weapon, petitioner was overheard telling his brother that "they found that gun." In addition, the evidence at trial showed that the gun had at one time traveled in interstate commerce and that petitioner had previously been convicted of a felony for making and possessing an unregistered sawed-off shotgun (Pet. App. 11; Tr. 115, 139-141, 187-197, 227, 247-251, 267-270, 279-280, 321-322).

Prior to petitioner's federal conviction, state authorities had prosecuted petitioner for armed (second degree) burglary, in violation of Ky. Rev. Stat. Ann. § 511.030 (1972). On March 6, 1978, a jury sitting in the Bath County (Kentucky) Circuit Court, convicted petitioner of the lesser included offense of unarmed (third degree) burglary, in violation of Ky. Rev. Stat. Ann. § 511.040 (1972). Petitioner received a two-year sentence of imprisonment for his state conviction.

2. The court of appeals correctly concluded that the federal prosecution that occurred in this case did not offend double jeopardy principles (Pet. App. 11). See, e.g., Abbate v. United States, 359 U.S. 187 (1959). However, the Department of

Justice adheres to a long-established policy of declining to prosecute individuals for acts forming the basis of a state conviction "except when necessary to advance compelling interests of federal law enforcement." Rinaldi v. United States, 434 U.S. 22, 28 (1977); see, e.g., Petite v. United States, 361 U.S. 529, 530 (1960). Here, no Petite waiver was obtained, and after careful review, we have concluded that petitioner's prosecution for unlawfully possessing a firearm was not supported by an independent compelling federal interest not satisfied by the state prosecution for armed burglary. Accordingly, no nunc pro tunc Petite waiver authorization is warranted. See, e.g., Rinaldi v. United States, supra; Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099.

We therefore request the Court to permit the effectuation of the government's policy against successive prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment. 1/

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

OCTOBER 1979

1/ In view of the relief we have requested, it is unnecessary for the Court to consider petitioner's additional contentions, which are, in any event, insubstantial.